Supreme Court, U.S.
FILED

10-255 AUG 18 2010

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No. _____

# In The
# Supreme Court of the United States

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ANDREW W. SHALABY, SONIA DUNN-RUIZ,
*Petitioners,*

v.

NEWELL RUBBERMAID, INC.; THE HOME DEPOT, INC.; IRWIN INDUSTRIAL TOOL COMPANY, INC.; BERNZOMATIC,
*Respondents.*

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On Petition for Writ Certiorari to the United States Court of Appeals for the Ninth Circuit

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## PETITION FOR WRIT OF CERTIORARI

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# QUESTIONS PRESENTED FOR REVIEW

1. In diversity jurisdiction actions brought in the Federal Courts, can the additional factors for admissibility of expert testimony under the U.S. Supreme Court's decision in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993) ("*Daubert*") be applied to disqualify experts who meets the admissibility requirements of California's *Frye* test?

2. Once the California Supreme and Appellate Courts established that *Daubert* was not applicable in California because it was not consistent with California law for the admissibility of expert testimony, did the Federal Courts err by continuing to apply *Daubert* in diversity cases since then?

## LIST OF PARTIES

1. ANDREW W. SHALABY, Plaintiff and Petitioner;

2. SONIA DUNN-RUIZ, Plaintiff and Petitioner;

3. NEWELL RUBBERMAID, INC., Defendant and Respondent;

4. IRWIN INDUSTRIAL TOOL COMPANY, INC.; Defendant and Respondent;

5. BERNZOMATIC, Defendant and Respondent;

6. THE HOME DEPOT, INC., Defendant and Respondent;

7. WORTHINGTON INDUSTRIES, INC. ("Worthington, Inc."), Third-party Defendant;

8. WESTERN INDUSTRIES, INC. (Western, Inc.), Third-party Defendant;

## CORPORATE DISCLOSURE STATEMENT

1. Newell Rubbermaid, Inc. is the parent corporation of Irwin Industrial Tool Company, Inc., and Irwin Industrial Tool Company, Inc. owns BernzOmatic. These three entities shall therefore be referenced as "BernzOmatic" throughout this petition.

2. The Home Depot, Inc. is not owned by any other party to this petition. BernzOmatic assumed the defense of Home Depot in this action.

3. Worthington, Inc. is not owned by any other party or entity involved in this action, and is a solo corporation.

4. Western, Inc. is not owned by any other party or entity involved in this action, and is a solo corporation.

"BernzOmatic" was the name shown on the torch product subject to this litigation. BernzOmatic filed a cross-complaint against Worthington, Inc. and Western, Inc., alleging that one of these two entities manufactured the subject torch as a subcontractor for BernzOmatic. The District Court dismissed BernOmatic's cross-complaint (App. 45), without prejudice to its refiling (Dist. Court docket #264, 1/22/2010, granting in part BernOmatic's motion for reconsideration).

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## OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit, filed on May 17, 2010, affirming the Federal Court's decision, is in the Appendix hereto, pp. 1-5.

The order of the Ninth Circuit denying rehearing and rehearing *en banc*, filed July 28, 2010, is reprinted in the Appendix hereto, pp. 47-48.

The order of the United States District Court for the Southern District of California, filed July 28, 2009, granting Defendants' "*Daubert*" motion to exclude Plaintiffs' expert witnesses, and dismissing the action, is reprinted in the Appendix hereto, pp. 6-46.

## JURISDICTION

On October 10, 2006 Plaintiffs filed a product liability action in the Alameda County Superior Court, Oakland, California, against Defendants Newell Rubbermaid, Inc., The Home Depot, Inc., Irwin Industrial Tool Company, Inc., and BernzOmatic (collectively "BernzOmatic"). BernzOmatic removed the case to the Northern District of California on November 9, 2006. (Appendix ("App.") p.8) Removal was based on diversity jurisdiction pursuant to 28 U.S.C. § 1332. BernzOmatic then moved for change of venue, and venue was transferred to the United States District Court for the Southern District of California, San Diego, on October 30, 2007. (App. 8)

On July 28, 2009, the Honorable Michael M. Anello, Judge for the United States District Court for the Southern District of California, filed his order dismissing the case, after granting BernzOmatic' motion to disqualify Plaintiffs' expert witnesses pursuant to this Court's authority, *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), and Federal Rules of Evidence, Rule 702 as amended in light of *Daubert*. (App. pp. 39, 44-45.)

On May 17, 2010 the Honorable Judges Stephen R. Reinhardt, Dorothy W. Nelson, and Daniel M. Friedman of the Ninth Circuit Court of Appeals issued their opinion affirming the District Court's order excluding Plaintiffs' experts pursuant to the Court's *Daubert* analysis, and dismissing the case on grounds that there was no longer an expert available to establish causation as required under California product liability law. (App. pp. 1-5)

On July 28, 2010 the Ninth Circuit issued an order denying Petitioners' petitions for panel and *en banc* rehearing. (App. pp. 47-48.)

The jurisdiction of this Court to review the Judgment of the Ninth Circuit is invoked under 28 U.S.C. § 1254(1).

## STATUTES AND AUTHORITIES AT ISSUE

*Frye v United States*, 293 F. 1013; 54 App. D.C. 46 (1923)- "[t]he thing from which the deduction is made must be sufficiently established to have gained general acceptance in the particular field in which it belongs."

*People v. Kelly*, 17 Cal.3d 24 (1976) - observing that the *Frye* standard holds several advantages, including (1) assuring that those persons most qualified to assess the validity of a scientific technique would have the determinative voice, (2) providing a "minimal reserve of experts" to critically examine each technique in a particular case, (3) promoting uniformity of decision based on finding a consensus in the scientific community, and (4) protecting the parties by its "essentially conservative nature."

*Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 599 (1993) ("*Daubert*"), holding that the Federal Rules of Evidence, Rule 702, superseded the former "*Frye*" standard for admitting expert testimony in all Federal Court diversity cases.

*Daubert v. Merrell Dow Pharmaceuticals*, 43 F.3d 1311, 1315 (9th Cir. 1995) (*Daubert II*) - referencing the Panel's observations that "Federal judges ruling on the admissibility of expert scientific testimony face a far more complex and daunting task in a post-*Daubert* world than before."

*People v. Leahy*, 8 Cal. 4th 587 (Cal. 1994), holding

that *Daubert* shall not supersede the "*Frye*" standard for admitting expert scientific testimony in California, thus rejecting *Daubert* analysis in California.

*Roberti v. Andy's Termite & Pest Control, Inc.*, 113 Cal. App. 4th 893 (Cal. App. 2d Dist. 2003), holding that "A *Daubert* Analysis Is Not Applicable in California."

*Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 58 S. Ct. 817, 82 L. Ed. 1188 (1938), holding that the substantive law is to be applied in any diversity case is the law of the forum State.

*Hanna v. Plumer*, 380 U.S. 460, 468 (U.S. 1965), holding that the 'outcome-determination' test, used to determine whether State or Federal law should apply in diversity cases, cannot be read without reference to the "twin aims of the Erie rule: discouragement of forum-shopping and avoidance of inequitable administration of the laws."

*Federal Rules of Evidence, Rule 702.* If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

*California Evidence Code section 801*: If a witness is testifying as an expert, his testimony in the form of an opinion is limited to such an opinion as is: (a) Related to a subject that is sufficiently beyond common experience that the opinion of an expert would assist the trier of fact; and (b) Based on matter (including his special knowledge, skill, experience, training, and education) perceived by or personally known to the witness or made known to him at or before the hearing, whether or not admissible, that is of a type that reasonably may be relied upon by an expert in forming an opinion upon the subject to which his testimony relates, unless an expert is precluded by law from using such matter as a basis for his opinion.

*28 U.S.C. § 1652*: The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply.

*U.S. Const. Amend. 14, § 1*: All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

## STATEMENT OF THE CASE

### A. Factual Background

Plaintiff was injured while using a common handheld torch, sold at Home Depot and many other large retail outlets. BernzOmatic was the sole manufacturer and distributor of the product in the United States. The packaging of the torch markets the product for such common uses as lighting of barbecue grills, expanding its use to a wide range of consumers. Plaintiff, Mr. Shalaby ("Plaintiff") was using the torch to relight a campfire. The torch exploded in his hand, causing severe burns to his face, hands, and legs. Plaintiff underwent multiple surgeries and blood transfusions, and suffered permanent injuries. Plaintiff alleged that the torch failed because a welded portion on top of the fuel cylinder, known as the "brazed joint" or "center bushing," was unreasonably weak and defective. BernzOmatic admitted that the brazed joint was the weak part of the cylinder, and designed a safety "fracture groove" feature on to the torch apparatus to prevent failure of the brazed joint in the event of the application of a force capable of causing failure of the brazed joint (*e.g.* if the torch is dropped). However, there was no application of force to the torch capable of invoking its fracture groove safety feature at the time of the accident. Because the torch failed without such force, and failed while being used in an intended and foreseeable manner, Plaintiffs concluded that the brazed joint was unreasonably weak and defective, and filed this product liability suit.

B. The District Court Proceedings

Plaintiffs retained an expert metallurgist, Dr. Robert Anderson. Dr. Anderson concluded that the brazed joint area where the torch failed was unreasonably weak and substandard, and that this was the reason it failed and caused Plaintiff's injuries. BernzOmatic moved to disqualify Dr. Anderson on grounds that, according to BernzOmatic, Dr. Anderson did not satisfy the "requirements" presented in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 [125 L. Ed. 2d 469] (1993) and its concomitant counterpart, Federal Rules of Evidence, Rule 702. Simultaneously, BernzOmatic moved for summary judgment on grounds that under California law, Plaintiffs could not establish causation without an expert. On July 28, 2009 the District Court, relying entirely on a *Daubert* analysis, excluded Plaintiffs' experts, and dismissed the action, finding that causation could not be established without an expert under California law. (App. pp. 39, 44-45.)

C. The Appellate Court Proceedings

On appeal, Petitioners urged upon the Court that *Daubert* was not intended to create additional hurdles for the admissibility of expert testimony, and that California's "generally accepted" admissibility requirements under *Frye* were, in the view expressed by this Court in *Daubert*, more "rigid" than the "liberal thrust" of and their "general approach of relaxing the traditional barriers to opinion testimony." (9th Cir. Docket #7165603, Appellant's brief filed 12/15/09, p. 17,

quoting from *Daubert, supra,* at 588.) However, even thought he Federal Court's order facially reflects that Dr. Anderson met the more "rigid" admissibility requirements of *Frye* (App. 14, 16 fn.7), the Ninth Circuit Court of Appeals affirmed the District Court's ruling excluding Dr. Anderson pursuant to its *Daubert* analysis, and granting summary judgment on grounds that Plaintiffs' case could not proceed without an expert. (App. pp. 1-5) Plaintiffs filed petitions for panel and en banc rehearing. Both were summarily denied on July 28, 2010. (App. pp. 47-48)

## REASONS FOR GRANT OF CERTIORARI

### I. *DAUBERT* HAS BEEN EXPLICITLY ABOLISHED IN CALIFORNIA COURTS, BUT FEDERAL COURTS CONTINUE TO APPLY IT IN DIVERSITY CASES

Something is seriously amiss when a federal district court can acknowledge that an expert's methods are "generally accepted" and yet find that his proposed testimony fails under the test for reliability established by *Daubert* and its progeny. When the Ninth circuit then affirms this erroneous ruling, it suggests that the time has come for this Court to clarify how the *Daubert* factors for determining admissibility of expert testimony are to be applied by the lower courts. This review is especially necessary here because a trial courts' admissibility rulings are subject only to abuse of discretion review. Prevalent mistakes in applying *Daubert* are not particularly

amenable to appellate review. Yet in cases where expert testimony is sought, a ruling disqualifying such testimony often will determine the outcome of the case. Product defect cases are the usual means of identifying dangerous products and taking them off the market to prevent injuries. This case involves such a product, a torch which has caused severe burn injuries, and alleged deaths, for several years now, and has managed to evade substantive judicial review on the merits because of *Daubert*. As Petitioners tried to impress upon the Ninth Circuit Court of Appeals, in *Daubert*, the U.S. Supreme Court explained that Federal Rules of Evidence, Rule 702 was supposed to be more *liberal* than the *Frye* test it replaced:

> The drafting history makes no mention of *Frye*, and a rigid "general acceptance" requirement would be at odds with the "liberal thrust" of the Federal Rules and their "general approach of relaxing the traditional barriers to 'opinion' testimony."

(*Daubert, supra* at 588.)

As is evident on the face of the District Court's order, *Daubert* provided a vehicle for disqualification of experts and dismissal of product liability actions which, if brought in State Court, could not as a matter of law have been dismissed. The order amply reflects that Plaintiffs' expert was excluded under a step-by-step *Daubert* analysis. (App. pp. 12-39). However, a *Daubert* analysis has explicitly been rejected by the California Supreme and Appellate Courts. *Roberti v. Andy's Termite & Pest Control, Inc.*, 113 Cal. App. 4th 893, 904-905 (Cal. App. 2d Dist. 2003)-

> A *Daubert* Analysis Is Not Applicable in California...Defendant contends that we should apply the foundational analysis employed in the federal courts to all expert testimony, an analysis the California Supreme Court has explicitly rejected... Use of the *Daubert* threshold reliability test is not, however, in keeping with the law in California.

The Federal Court's order also reflects that had this case been litigated in State Court, where the only admissibility requirement for expert testimony is that it meet the "generally accepted" principles articulated in California's applicable *Frye* test, the experts would not have been excluded. (App. pp. 14,16 fn.7) (An explanation of the difference between the Federal and State Court tests is presented below.)

Since *Daubert*, its application in non-*Daubert* jurisdictions has consistently violated the "twin aims" of *Erie*: discouragement of forum-shopping, and avoidance of inequitable administration of the laws." (*Hanna*, *supra*, at 468.) A cursory research suggests that *Daubert's* application in Federal Court diversity cases has been challenged at least 274 times.[1] *Daubert* itself was a California diversity product liability case, and its holding mandated its application in Federal Court at that time:

> Because we hold that *Frye* has been superseded and base the discussion that follows on the content of the

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[1]Source: Lexis electronic research, August 5, 2010.

> congressionally enacted Federal Rules of Evidence, we do not address petitioners' argument that application of the *Frye* rule in this diversity case, as the application of a judgemade rule affecting substantive rights, would violate the doctrine of *Erie R. Co. v. Tompkins*, 304 U.S. 64, 82 L. Ed. 1188, 58 S. Ct. 817 (1938).

(*Id.* at 589.)

*Daubert* allows Federal Courts to dismiss product liability actions by applying the admissibility standards of *Daubert,* even when the expert testimony in question has already been deemed admissible under California's *Frye* test, as evidenced in the order of this case (App. pp. 14,16 fn.7). *Daubert* has now repeatedly proved to be inconsistent with 28 U.S.C. § 1652, which provides that "The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply." The outcome of a case litigated under State law should not be dependent on whether it is litigated in State Court vs. Federal Court, as was the case here. Petitioners respectfully submit that because the California Supreme and Appellate Courts have expressly rejected *Daubert's* application in California, its application in Federal Courts sitting in diversity in California appears to violate the Equal Protection clause of the 14th Amendment, as well as the "*twin aims*" of *Erie*, therefore it should no longer be applied in diversity Federal Court actions in California.

## II. JUDICIARY CONCERNS WITH *DAUBERT*

Justices Stevens and Rehnquist dissented in *Daubert* because they were concerned the decision imposed a duty on judges to become "amateur scientists" and created "countless more questions" when "hundreds of district judges try to apply its teaching to particular offers of expert testimony." (*Id.* at 599.) On remand of *Daubert* to the Ninth Circuit, the Panel expressed the same concerns, finding it now had a "daunting" task under *Daubert*, which had not existed under the "*Frye*" test it replaced:

> Federal judges ruling on the admissibility of expert scientific testimony face a far more complex and daunting task in a post-*Daubert* world than before. The judge's task under *Frye* is relatively simple: to determine whether the method employed by the experts is generally accepted in the scientific community. *Solomon*, 753 F.2d at 1526. Under *Daubert*, we must engage in a difficult, two-part analysis. First, we must determine nothing less than whether the experts' testimony reflects "scientific knowledge," whether their findings are "derived by the scientific method," and whether their work product amounts to "good science."

(*Daubert II*, *Id.* at 1315.)

*Daubert* does not apply in California State Courts, but product liability defendants and others are able to avoid California law by removing cases to

Federal Courts, where *Daubert* continues to be applied, in direct conflict with California's high court decisions (*supra*).

## (A) UNDERSTANDING THE DIFFERENCES BETWEEN THE FEDERAL AND STATE ADMISSIBILITY REQUIREMENTS FOR EXPERT TESTIMONY

Before *Daubert*, the standard for admissibility of expert testimony in Federal Courts was the "general acceptance" test of *Frye v. United States*, 54 App. DC 46, 293 F. 1013, 34 ALR 145 (1923)("*Frye*"). For admissibility under *Frye*, this Court held, "the thing from which the deduction is made must be sufficiently established to have gained general acceptance in the particular field in which it belongs." In California, the test is most often referred to as the "*Kelly/Frye*" or "general acceptance" test (*Leahy, supra*, at 591).

In *Daubert* this Court held that the former *Frye* test was superseded by the adoption of the Federal Rules of Evidence. The majority in *Daubert* agreed on four non-exclusive criteria for reliability determinations: "(1) whether the expert's methodology has been tested or is capable of being tested; (2) whether the technique has been subjected to peer review and publication; (3) the known and potential error rate of the methodology; and (4) whether the technique has been generally accepted in the proper scientific community." *McDowell v. Brown*, 392 F.3d 1283, 1298 (11th Cir. 2004). *Daubert II* added yet a fifth consideration, "litigation generated opinions" (App. 25; *Daubert II, id.* at 1317.)

(B) CONCERNS EXPRESSED IN THE *DAUBERT* DISSENT

In their *Daubert* dissent, Justices Stevens and Rehnquist expressed their concern that the majority had construed Federal Rules of Evidence, Rules 702 and 703 very much in the abstract, then offered some "general observations," which have now become more aptly known as the "*Daubert* factors" (*supra*). The dissent predicted:

> Questions arise simply from reading this part of the Court's opinion, and countless more questions will surely arise when hundreds of district judges try to apply its teaching to particular offers of expert testimony.

(*Id.* at 599.)

The dissenting justices were concerned that these *"Daubert Factors"* would "carry great weight with lower federal courts," imposing on them "the obligation or the authority to become amateur scientists." (*Id.* at 601.) In fact, the District Court excluded Plaintiffs' experts in this case by conducting a step-by-step "*Daubert*" analysis based on each of these factors, as further discussed below.

(C) CONCERNS EXPRESSED BY THE NINTH CIRCUIT ON *DAUBERT'S* REMAND

After deciding *Daubert*, this Court remanded it to the Ninth Circuit to apply *Daubert's* teachings in concluding *Daubert's* appeal. The Ninth Circuit was very uncomfortable with this, explaining that *Daubert*

"puts federal judges in an uncomfortable position" because it imposes the duty on them to become amateur scientists:

> As we read the Supreme Court's teaching in *Daubert*, therefore, though we are largely untrained in science and certainly no match for any of the witnesses whose testimony we are reviewing, it is our responsibility to determine whether those experts' proposed testimony amounts to "scientific knowledge," constitutes "good science," and was "derived by the scientific method."

(*Id.* at 1316.)

The Ninth Circuit wrestled with its new task on *Dabert's* remand, seemingly unsure if it understood the decision correctly:

> Our responsibility, then, unless we badly misread the Supreme Court's opinion, is to resolve disputes among respected, well-credentialed scientists about matters squarely within their expertise, in areas where there is no scientific consensus as to what is and what is not "good science," and occasionally to reject such expert testimony because it was not "derived by the scientific method." Mindful of our position in the hierarchy of the federal judiciary, we take a deep breath and proceed with this heady task.

(*Id.* at 1316.)

Mirroring the concerns of dissenting Justices Rehnquist and Stevens, the Ninth Circuit then points

out the difficulty of a judge assuming the role of an amateur scientist, because scientists themselves often have vigorous disagreements:

> As the record in this case illustrates, scientists often have vigorous and sincere disagreements as to what research methodology is proper, what should be accepted as sufficient proof for the existence of a "fact," and whether information derived by a particular method can tell us anything useful about the subject under study.

(*Id.* at 1316.)

(D) CONCERNS EXPRESSED BY CALIFORNIA'S HIGH COURTS IN REJECTING *DAUBERT*

The California Supreme and Appellate Courts shared the same concerns expressed by Justices Rehnquist and Stevens, pointing out that *Daubert* is being used as a "second hurdle" expert testimony has to meet if it has already met the "generally accepted" principles of the *Frye* test. For example, in *Roberti v. Andy's Termite & Pest Control, Inc.*, 113 Cal. App. 4th 893, 904-905 (Cal. App. 2d Dist. 2003),under a heading stating, "II. A *Daubert* Analysis Is Not Applicable in California," the California Second District Court of Appeal rejects the added admissibility hurdles of *Daubert*, and points out that *Daubert* was intended to apply to "new science techniques" only:

> What defendant would have us do, under the guise of determining whether the challenged testimony was supported by

> unschooled in scientific areas, to evaluate highly technical scientific material. As the Harvard Note, *supra*, observes, "The *Frye* rule ensures that judges and juries with little or no scientific background will not attempt to resolve technical questions on which not even experts can reach a consensus ...." (101 Harv. L.Rev. at p. 127, fn. omitted.)

(*Id.* at 602-603.)

(E) CALIFORNIA APPELLATE COURTS AND FEDERAL COURTS DISAGREE ON WHETHER DAUBERT APPLIES ONLY TO NEW SCIENTIFIC TECHNIQUES

Federal Courts sitting in diversity apply *Daubert's* foundational requirements for admissibility of expert testimony to *all* diversity cases. However, the California Appellate Courts believe that *Daubert* was a "broadening" of the *Kelly/Frye* test, intended by the U.S. Supreme Court to apply only to "new scientific techniques" only:

> Citing *People v. Stoll*, *supra*, 49 Cal.3d 1136, the *Leahy* court noted that "*Kelly* is applicable only to new scientific techniques." (Leahy, *supra*, at p. 605.) The Supreme Court did not suggest that the federal courts' application of the *Daubert* federal reliability test to all expert opinion testimony broadens the applicability of the *Kelly* test under California law to anything other than

> the proper foundation, is conduct a *Daubert*-style analysis, precisely as the court did in *National Bank of Commerce*, *supra*, 965 F. Supp.1490 Use of the *Daubert* threshold reliability test is not, however, in keeping with the law in California. In *People v. Leahy* (1994) 8 Cal.4th 587 [34 Cal. Rptr. 2d 663, 882 P.2d 321], our Supreme Court refused to adopt the federal reliability test derived from Federal Rules of Evidence rule 702 established in *Daubert*...[t]here is no authority or rationale to support the notion impliedly promoted by defendant that on the one hand, the *Kelly* rule retains viability as to new scientific methodology, techniques, or devices, but on the other hand California courts may apply a *Daubert* threshold reliability analysis to everything else, *including expert medical testimony and all other scientific and technical testimony that has already gained general acceptance*. (Italics added.)

In *Leahy* the California Supreme Court also shares the concerns of Justices Stevens, Rehnquist, and the Ninth Circuit as expressed in *Daubert II*, pointing out the *Frye* rule's safeguards, so that the trial judge will not take on the roll of "amateur scientist" in ruling on expert admissibility pursuant to *Daubert*:

> Some commentators have questioned the ability of trial judges, often wholly

new scientific techniques.

(*Roberti, supra,* at 905.)

This confusion further favors the granting of certiorari to clarify whether *Daubert* is, or should be, limited in application to "new scientific techniques," if its application is to continue in Federal Court cases in the non-*Daubert* states.

(F) *DAUBERT* FORUM-SHOPPING

*Hanna v. Plumer* holds that:

> The 'outcome-determination' test, used to determine whether State or Federal law should apply in diversity cases, cannot be read without reference to the "twin aims of the Erie rule: discouragement of forum-shopping and avoidance of inequitable administration of the laws.

(*Id.* at 468.)

This case illustrates that *Daubert* has now established additional hurdles for admissibility of expert testimony, and provided additional vehicles of dismissal of cases which would not have been dismissed had they been brought in State Court, causing product defect defendants to flock to the Federal Courts. As evidenced on the Federal Judiciary's Pacer database, since *Daubert*, Respondents have removed every diversity product liability case filed in State Courts throughout the country, including the following:

Roland v. (BernzOmatic), #1:2006cv01292, removed 08/29/2006;

Shalaby et al v. (BernzOmatic), #3:2006cv07026, removed 11/09/2006;
Ramon Sandoval et al v. BernzOmatic et al, #2:2006cv07989, removed 12/15/2006;
Lamoureaux et al v.(BernzOmatic), #2:2007cv10949, removed 03/05/2007;
Welch et al v.(BernzOmatic), 3:2007cv01228, removed 07/26/2007;
Vanderlinde v.(BernzOmatic), #0:2007cv04762, removed 12/05/2007;
Wooden et al v.(BernzOmatic), #3:2008cv00185, removed 4/7/08;
Bradley Englebrick et al v. (BernzOmatic), #8:2008cv01296, removed 11/14/08;
Tucker v. BernzOmatic et al., #2:2009cv05881, removed 12/10/2009;
Regents (UC) v. BernzOmatic, et al., #2:2010cv01224, removed 05/19/2010;
Wessner v. (BernzOmatic), #2:2010cv03509, removed 07/15/2010

In all of these cases, and the many others filed against BernzOmatic in State Courts and overseas, the plaintiffs alleged they had been severely and permanently burned and injured when their MAPP gas cylinders failed at the brazed joint areas under reasonably foreseeable use. BernzOmatic removed these cases to avoid the "generally accepted" expert admissibility requirements of the various State Courts, and subject the plaintiffs to the now more stringent "*Daubert* analysis" applied by the Federal Courts. Had this case been litigated in State Court, the testimony of Plaintiffs' expert, Dr. Robert Anderson, would have been admissible because it met the "general

acceptance" principles of *Frye*. The *Frye* test merely requires, as a foundational requirement for admissibility of expert testimony, that the expert's testing be generally accepted by the scientific community. (*Leahy, supra,* at 593-594.) In this case, the Federal Judge found that Dr. Anderson's metallurgical tests met the "generally accepted" foundational requirements of *Frye*:

> [t]he Court finds that Dr. Anderson's education, training, and experience, meet the standards for qualification as an expert witness in metallurgy under Fed. R. Evid. 702.

(App. 14.)

> It does not appear from the motions before the Court that Defendants are contesting the quality of the various metallurgical tests conducted by Dr. Anderson. Thus, the Court finds that Dr. Anderson's metallurgical tests were conducted in accordance with generally accepted principles.

(App. 16 fn.7.)

Under *Frye*, Dr. Anderson would therefore have not been excluded, and summary judgment would not have been granted. However, as Justices Rehnquist and Stevens predicted, *Daubert* allowed the judge in this case to exclude the testimony of Dr. Anderson under the "*Daubert* factors," allowing the Ninth Circuit to uphold the Judge's decision on an "abuse of discretion" standard. As observed on the District Court's order, the Judge went through a step-by-step analysis of each of the "*Daubert* factors" in

disqualifying Dr. Anderson:

i. Testing (App. 15)
ii. Peer Review and Publication (App. 20)
iii. Rate of Error (App. 24)
iv. General Acceptance (App. 24)
v. Litigation Generated Opinions (App. 25)

As stated above, application of these *"Daubert factors"* (except for "general acceptance," which is the *Fyre* test) was explicitly rejected by the California Supreme and Appellate Courts (*e.g. Roberti, supra* -"A *Daubert* Analysis Is Not Applicable in California"). In Federal Courts, *Daubert* is now being misused as a vehicle of bypassing State law by removing diversity cases to Federal Courts for the more rigid admissibility requirements of *Daubert*.

## (G) THE "GENERAL OBSERVATIONS" WHICH HAVE BECOME "*DAUBERT* FACTORS" SHOULD NOT BE USED TO DISQUALIFY AN EXPERT WHO MEETS CALIFORNIA'S "*FRYE*" STANDARDS

Petitioners submit that *Daubert* should not be applied to disqualify experts whom otherwise meet the more "rigid" admissibility requirements of California's *Frye* test, as was the case here. If *Daubert* is to continue to apply in diversity cases, Petitioners respectfully request that the U.S. Supreme Court clarify that its application is intended to liberalize the admissibility requirements for new scientific techniques only, as it appears was intended, and as understood by the *Roberti* Court, *supra*. Otherwise, given the degree of confusion and concerns expressed by Justices Stevens and Rehnquist, the Ninth Circuit

panel presiding over the remand of *Daubert* , and California's Supreme and Appellate Courts, it would appear that the U.S. Supreme Court may be able to resolve these concerns by declaring that *Daubert* should no longer be applied in diversity cases brought in California.

## CONCLUSION

As this Court explained in *Daubert,* the traditional means of attacking admissible evidence is vigorous cross-examination:

> "[V]igorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence."

(*Daubert, supra,* at 596.)

However, when *Daubert* articulated its four "general observations," dissenting Justices Stevens and Rehnquist grew concerned that those observations would carry too much weight with the Federal Courts, and be treated as though they were separate and independent hurdles for admissibility of expert testimony, so that the "*traditional and appropriate means*" of attacking evidence in the Courtroom and on cross-examination would yield to the discretion of the Judge in his or her role as "amateur scientist." Indeed, since *Daubert*, the "general observations" have not only become aptly known as the "*Daubert* factors," but have been applied as additional admissibility hurdles in Federal Court diversity cases ever since. Because

*Daubert* has now become a vehicle for improper forum-shopping, and has been declared inconsistent with California law, its continued application in Federal Courts sitting in diversity and applying California law violates the Equal Protection clause of the Fourteenth Amendment and transcends the "twin aims" of *Erie*. In this case, the Federal Court established on its order that Dr. Anderson was a qualified expert witness, and met the "general acceptance" foundational requirements under California's *Frye* test, therefore the exclusion of Dr. Anderson based on the additional "*Daubert*" hurdles evidenced on the face of the District Court's order (App. 14, 16 fn.7), and its resulting dismissal of the action, should be reversed. Petitioners respectfully request that this Court clarify its holding in *Daubert* so that the lower Courts understand that if proffered expert testimony meets the admissibility requirements of the forum state's law, the "additional factors" of *Daubert* cannot be applied in diversity cases to exclude the expert, or if more appropriate, that *Daubert* cannot apply in diversity cases if the forum state's highest Court has explicitly rejected *Daubert's* application in the State.

Respectfully submitted:

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** Counsel of Record for Petitioners*

May 17, 2010, Filed No. 09-56331

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

ANDREW W. SHALABY;
SONIA DUNN-RUIZ,

Plaintiffs - Appellants,

v.

NEWELL RUBBERMAID, INC.;
THE HOME DEPOT, INC.;
IRWIN INDUSTRIAL TOOL COMPANY, INC.;
BERNZOMATIC,

Defendants-cross-claimants - Appellees,

and

WESTERN INDUSTRIES, INC.;
WORTHINGTON INDUSTRIES,

Cross-defendants - Appellees,

Appeal from the United States District Court for the Southern District of California
Michael M. Anello, District Judge, Presiding

OPINION
MEMORANDUM *

* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

Argued and Submitted April 7, 2010
Pasadena, California

Before: FRIEDMAN,** D.W. NELSON, and REINHARDT, Circuit Judges.

This is a diversity products liability case under California law that the appellants, Andrew W. Shalaby, and his wife, Sonia Dunn-Ruiz, filed for injuries he sustained when a handheld, gas-powered torch that he had purchased from a Home Depot store exploded. The district court granted summary judgment for the defendants, and we affirm.

To establish a prima facie case of products liability, California law requires:

> [S]ubstantial evidence establishing both the defect and causation (a substantial probability that the design defect, and not something else, caused the plaintiff's injury) and where . . . the complexity of the causation issue is beyond common experience, expert testimony is required to establish causation.

*Stephen v. Ford Motor Co.*, 134 Cal. App. 4th 1363, 1373, 37 Cal. Rptr. 3d 9 (Cal. Ct. App. 2005).

**The Honorable Daniel M. Friedman, United States Circuit Judge for the FederalCircuit, sitting by designation.

1. Determining the cause of the explosion here required exploration and evaluation of complex facts and theory "beyond common experience." It presented questions of physics, metallurgy, and engineering related to the construction, composition, design and operation of a handheld torch attached to a gas cylinder. The district court properly recognized that the plaintiffs therefore were required to present expert testimony on these issues to establish a prima facie case.

2. The district court did not abuse its discretion in excluding the testimony of the plaintiffs' two expert witnesses. The experts' proposed testimony was developed in pretrial proceedings, and the district court discussed it in detail in its opinion. The trial court has broad discretion to admit or reject expert testimony to "ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable." Daubert v. Merrell Dow Pharms., 509 U.S. 579, 589, 592-93, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993).

The court excluded the testimony of one of those witnesses, Dr. Anderson, a metallurgy expert, as unreliable and irrelevant. To support his theory that a design defect in the torch caused the explosion, Dr. Anderson conducted two tests on exemplar torches to demonstrate the flaw. The district court concluded that because Dr. Anderson had performed only two non-standardized tests, on torches that may have been different from the one here at issue, and did not adequately explain the results of or discuss the

possible rate of error for such tests, his testimony would be unreliable. It would also be unreliable because he did not address certain contradictory evidence. Finally, he did not present adequate evidence that the design flaw caused Shalaby's injuries, rendering his testimony irrelevant.

The district court excluded the testimony of the other witness, Dr. Vredenburgh, because she was not a qualified expert and, even if she were, her testimony was unreliable and irrelevant. Dr. Vredenburgh's field of expertise was not torches; she had some experience in the formulation of warning instructions for various devices. When asked whether a different or larger warning would have helped in Shalaby's case, Dr. Vredenbugh testified that "I don't know why [the torch] failed, so I don't know that a warning would have helped." She stated that she had never operated a handheld torch and had not seen one operated in seventeen years. She had not spoken to any users [*5] of handheld torches in many years, and she had incorrectly testified about how such a torch is used. Dr. Vredenburgh admitted that she did not collect any empirical data, did not conduct any testing, did not conduct any surveys, did not seek data from manufacturers, did not review any peer-reviewed literature, did not conduct any other kind of research prior to forming her opinion, and did not follow her own typical process for developing product warnings.

The district court's exclusion of these two witnesses' testimony meant that the plaintiffs had not presented the "expert testimony . . . required to

establish causation." Stephen, 134 Cal App. 4th at 1373. The district court correctly applied California law in concluding that the plaintiffs had not established a prima facie case, and the court therefore properly granted summary judgment for the defendants.

3. We have considered but find unpersuasive the various other arguments the appellants make against the district court's decision. Those contentions need not be discussed.

AFFIRMED.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

CASE NO. 07CV2107-MMA (BLM)

ANDREW SHALABY and SONIA DUNN-RUIZ,

Plaintiffs,

vs.

IRWIN INDUSTRIAL TOLL COMPANY, THE HOME DEPOT, INC., and DOES 2 through 100, inclusive,

Defendants.

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BERNZOMATIC,

Third Party Plaintiff,

vs.

WESTERN INDUSTRIES, INC., WORTHINGTON INDUSTRIES, and ROES 2 through 100, inclusive,

Third Party Defendants.

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ORDER:

(1) GRANTING THIRD PARTY DEFENDANT WORTHINGTON'S MOTION TO EXCLUDE TESTIMONY BY DR. ALISON VREDENBURGH; [ Doc. No. 53]

(2) GRANTING THIRD PARTY DEFENDANT WORTHINGTON'S MOTION TO EXCLUDE TESTIMONY BY DR. ROBERT ANDERSON;
[Doc. No. 58]

(3) GRANTING DEFENDANTS IRWIN TOOL INDUSTRIAL TOOL COMPANY, INC. AND THE HOME DEPOT, INC.'S MOTION FOR SUMMARY JUDGMENT;
[Doc. No. 45]

(4) FINDING AS MOOT THIRD PARTY DEFENDANT WORTHINGTON'S MOTION FOR SUMMARY JUDGMENT AGAINST PLAINTIFFS AND CROSSMOTIONS FOR SUMMARY JUDGMENT ON THIRD-PARTY COMPLAINT;
[Doc. Nos. 44, 49, 55]

(5) DISMISSING THIRD PARTY COMPLAINT FOR LACK OF SUBJECT MATTER JURISDICTION

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On October 10, 2006, Plaintiffs Andrew Shalaby and Sonia Dunn-Ruiz filed a product liability action in Alameda County Superior Court against Newell Rubbermaid, Inc. ("Newell") and The Home Depot, Inc. ("Home Depot"). (Doc. No. 1.) Defendants then removed the case to the Northern District of California, after which Plaintiffs filed a First Amended Complaint ("FAR") that kept Home Depot as a named Defendant but substituted Irwin Industrial Tool Company, Inc. ("Irwin") as a defendant in place of Newell. (*Id.*) Thereafter, Bernzomatic, a division of Irwin, sued Worthington and Western Industries, Inc. for indemnity in a third-party complaint. (*Id.*)[1] On October 30, 2007, the Northern District of California transferred the action to this Court. (*Id.*)

## BACKGROUND

This action arises out of events that occurred on the night of April 21, 2006, in which Mr. Shalaby was engulfed in flames while he used a handheld torch attached to a MAPP gas cylinder. (*Id.*) It is undisputed that Third-Party Plaintiff Bernzomatic manufactured the handheld torch; however, it remains in dispute whether Worthington Industries or Western Industries manufactured the MAPP gas cylinder. Initially, Mr. Shalaby alleged that he was using the torch to light a campfire. He claimed that he kneeled downward over

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[1] For simplicity, Irwin Industrial Tool Company Inc., The Home Depot, Inc., Bernzomatic, Western Industries, and Worthington Industries shall be collectively referred to as "Defendants" unless noted otherwise.

the fire ring, depressed the igniter button, heard a hissing sound, then aloud boom, and was then engulfed in flames. (Shalaby Depo. I at 141:2–12, 145:6–12, 146:3–16,147:17–22, 151:14–152:4, 159:17–160:8.) Within a few days of the accident, an unknown staff member at the campground discarded the torch and MAPP gas cylinder. (Ratliff Depo. 37:15–17.)

Plaintiffs' expert, Dr. Robert Anderson, concluded that the accident was the result of a defective braze joint in the MAPP gas cylinder. Dr. Anderson did not conclude that there were any defects in the torch itself. After the close of discovery, however, Mr. Shalaby began alleging that immediately prior to depressing the trigger button, he lightly tapped the tip of the torch against a piece of firewood at the moment of the explosion. (Consolidated Opp. [Doc. No. 172] at 4:14–16.) Based on Mr. Shalaby's new recollection of how the accident occurred, Dr. Anderson conducted new tests, whichled him to the new conclusion that the fracture groove on the torch, in addition to the braze joint onthe MAPP Cylinder, was defective. Shortly after the close of discovery, which included depositions of Mr. Shalaby and Dr. Anderson, Plaintiffs turned the new report over to Defendants. Defendants thereafter sought to exclude the untimely report. (Doc. No. 46.) Plaintiffs then moved to supplement their expert discovery with the new report. (Doc. No. 93.) They also moved for leave to amend the complaint to assert the new factual allegations. (Doc. No. 98.)

On March 11, 2009, in a thorough and well-reasoned order, Magistrate Judge Major denied

Plaintiffs' motion to supplement their expert discovery with Dr. Anderson's supplemental report.(Doc. No. 131.) On March 27, 2009, Magistrate Judge Major affirmed her March 11 ruling by denying Plaintiffs' motion for reconsideration. (Doc. No. 146.) In accordance with Magistrate Judge Major's rulings, the Court thereafter denied Plaintiffs' motion for leave to file a second amended complaint.(Doc. No. 204.) On July 7, 2009, the Court also found as moot Bernzomatic's motion to precludePlaintiffs from relying upon Dr. Anderson's untimely supplemental report and the opinions and conclusions contained therein based on Magistrate Judge Major's and this Court's previous rulings.(Doc. No. 207.)

Now pending before the Court are three motions. The first motion is Worthington's motion toexclude Plaintiffs' expert Dr. Robert Anderson under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*,509 U.S. 579 (1993). (Doc. No. 58.) The second motion is Worthington's motion to exclude Plaintiffs'expert Dr. Alison Vredenburgh under *Daubert*. (Doc. No. 53.) The third motion is Irwin IndustrialTool Company, Inc. and The Home Depot's *Daubert* motion for summary judgment,[2] which also seeks to exclude the proffered testimony of both Drs. Anderson and Vredenburgh. (Doc. No. 45.) Bernzomatic contends that summary judgment is warranted because Plaintiffs' experts' testimony is inadmissible under *Daubert*, and they

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[2] Because Bernzomatic, the third party plaintiff in this action, is a division of Irwin and the manufacturer of the torch, to the extent that the Court refers to the subject motion for summary judgment is shall refer to it as "Bernzomatic's motion."

cannot establish a prima facie case for products liability without the expert testimony. (*Id.*) For purposes of simplicity, the Court shall address these motions together.[3]

The Court notes that much of Plaintiffs' opposition focuses on Mr. Shalaby's new factualrecollections and frequently refers to Dr. Anderson's excluded untimely supplemental report. Inaccordance with the Court's previous rulings, the Court shall disregard all arguments and references pertaining to the excluded evidence when addressing the merits of Defendants' various motions at issue in this order.[4]

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[3] On May 25, 2009, Plaintiffs filed a lengthy document entitled "Plaintiffs' Request for Judicial Notice." (Doc. No. 200.) Defendants promptly objected to this filing, arguing that it is "obviously a camouflaged motion for summary judgment." (Doc. No. 202.) The Court agrees. "A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by report to sources whose accuracy cannot reasonably be questioned." FED.R.EVID. 201(b). The facts for which Plaintiffs seek judicial notice are clearly in dispute, and the request appears to be nothing more than an untimely motion for summary judgment. Accordingly, Plaintiffs' request is DENIED.

[4] In conjunction with its reply brief, Bernzomatic filed several objections to evidence in plaintiffs' opposition. (Doc. No. 192-1.) To the extent that the Court discusses and relies on evidence in this Order, it finds that the evidence is admissible and overrules any objection to it.

## DISCUSSION

I. Motions to Exclude Expert Testimony under Federal Rule of Evidence 702

A. Legal Standard

Rule 702 governs the admissibility of expert testimony. Pursuant to Rule 702, a witness qualified as an expert in "scientific . . . knowledge" may testify thereto if: "(1) the testimony is based upon sufficient facts or data; (2) the testimony is the product of reliable principles and methods; and(3) the witness has applied the principles and methods to the facts of the case." Fed. R. Evid. 702.

The trial court acts as a gatekeeper to the admission of expert scientific testimony under Rule702.*Daubert*, 509 U.S. at 579–80. The court must conduct a preliminary assessment to "ensure that any and all scientific testimony or evidence admitted is not only relevant but reliable." Id. at 589. This two-step assessment requires consideration of whether: (1) the reasoning or methodology underlying the testimony is scientifically valid (the reliability prong); and (2) whether the reasoning or methodology properly can be applied to the facts in issue (the relevancy prong). Id. at 592–93; *Kennedy v. Collagen Corp.*, 161 F.3d 1226, 1228 (9th Cir. 1998).

The *Daubert* analysis focuses on the principles and methodology underlying an expert's testimony, not on the expert's conclusions. *Daubert*, 509 U.S. at 595. However, the Supreme Court has cautioned that "conclusions and methodology are not entirely distinct from one another." *General Elec. v. Joiner*, 522 U.S.

136, 146 (1997). As such, "[a] court may conclude that there is simply too great an analytical gap between the data and the opinion proffered." Id. Nothing in either *Daubert* or the Federal Rules of Evidence requires the admission of opinion evidence connected to existing data "only by the ipse dixit of the expert." Id.

*B. Dr. Robert Anderson*

*1. Qualifications*

According to his curriculum vitae ("CV"), Dr. Anderson has several chemistry related degrees, as well as a Ph.D. in Metallurgy[5] from Stanford University. (Anderson Decl. at Ex. 1.) He is also licensed as a registered Metallurgical Engineer in the State of California. Formerly, Dr. Anderson was the department chair of the Department of Materials Engineering at San Jose State University, where he was also a full professor, and served as an associate professor at Stanford University. (*Id.*) Dr. Anderson has also held positions in several professional associations, including: Director and Fellow of the American Academy of Forensic Sciences, where he also served as the former chairman of the Engineering Sciences Section; Fellow and Past President of the National Academy of Forensic Engineers; and Diplomats and Director of the Institute of Forensic

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[5] Metallurgy is the scientific study and technology of extracting metals from ores, refining them for use, and creating alloys and useful objects from them. American Heritage Science Dictionary 2002.

Engineering Sciences. (*Id.*) It appears from the motions pending before the Court that Dr. Anderson's qualifications are not in dispute. Thus, the Court finds that Dr. Anderson's education, training, and experience, meet the standards for qualification as an expert witness in metallurgy under Fed. R. Enid. 702.

*2. Proffered Testimony*

Defendants challenge the admissibility of Dr. Anderson's testimony on the grounds that the proffered testimony fails to meet the standards set forth by the Supreme Court in *Daubert*. As stated by the *Daubert* Court, there is a two-part inquiry under Rule 702 for determining the admissibility of proffered expert opinion testimony. Expert testimony must be "not only relevant, but reliable." *Daubert*, 509 U.S. at 589.

*a. Reliability*

The first prong the Court must address is whether the proffered testimony is reliable. Reliable testimony must be grounded in the methods and procedures of science and signify something beyond "subjective belief or unsupported speculation." *Daubert*, 509 U.S. at 590. The inferences or assertions drawn by the expert must be derived by the scientific method. Id. In essence, the court must determine whether the expert's work product amounts to be "good science." *Daubert* v. *Merrell Dow Pharms., Inc.*, 43 F.3d 1311, 1315 (9th Cir. 1995) ("*Daubert* II") (quoting

*Daubert*, 509 U.S. at 593).[6] In *Daubert* I, the Supreme Court outlined factors relevant to the reliability prong, including: (1) whether the theory can be and has been tested; (2) whether it has been subjected to peer review; (3) the known or potential rate of error; and (4) whether the theory or methodology employed is generally accepted in the relevant scientific community. *Daubert*, 509 U.S. at 593–94. The Supreme Court emphasized the "flexible" nature of this inquiry. Id. at 594. As later confirmed in Kumho Tire Co.v.Carmichael,526 U.S. 137 (1999): "*Daubert*'s list of specific factors neither necessarily nor exclusively applies to all experts or in every case. Rather the law grants a district court the same broad latitude when it decides how to determine reliability as it enjoys in respect to its ultimate reliability determination."Id. at 141–42.

*i. Testing*

Dr. Anderson contends that the braze material between the center valve housing and the cylinder is the weak element in the assembly. (Anderson Decl. at Ex. 5, p.4.) He theorizes that the braze material is weak because it has voids and lacks sufficient fusion to the cylinder wall and valve housing. (*Id.*) In assessing the porosity in the brazed joint, Dr. Anderson performed several tests as described in his initial report. (*Id.* at 3.) In microphotographs of the brazing

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[6] In additional, the Supreme Court *Daubert* case shall be referred to hereinafter as "*Daubert* I."

material, black spots appear, which Dr. Anderson contends are voids rising above mere porosity resulting from poor"wetting" and incomplete penetration of the braze joint. (*Id.* at 3.)[7] Dr. Anderson stated that his understanding of how Worthington applies the braze paste to its MAPP gas cylinders was based on the description provided by Mr. Gentry, but his description of the process was at odds with how Mr. Gentry described the process. (*Id.*) Dr. Anderson also conceded at his deposition that he did not conduct any independent investigation into the process. (Anderson Depo. at 178:7–17.)

Moreover, Dr. Anderson provides no basis for his conclusion that the voids make the braze material unacceptably weak. He admitted in his deposition that he had not conducted any tests to determine what level of porosity or voids would make a brazed joint unreasonably weak and that he did not know of any standards regarding acceptable amounts of porosity in a brazed joint. (Anderson Depo. at 179:5–182:23.) He was also unable to name any study or test to support his opinion that the levels of porosity or voids made the braze joint insufficiently strong. (*Id.*) Yet, Dr. Anderson concluded that the voids found in the braze material were unacceptable. As the Ninth Circuit has stated, "something doesn't become 'scientific knowledge' just because it's uttered by a scientist; nor

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[7] It does not appear from the motions before the Court that Defendants are contesting the quality of the various metallurgical tests conducted by Dr. Anderson. Thus, the Court finds that Dr. Anderson's metallurgical tests were conducted in accordance with generally accepted principles.

can an expert's self-serving assertion that his conclusions were 'derived by the scientific method' be deemed conclusive[.]" *Daubert* II, 43 F.3d at 1315–16.

Dr. Anderson also hypothesizes that one of the reasons the voids occur is because the melting point of the braze paste is less than the temperature of the braze furnace. (*Id.* at 164:1–165:5.)However, Defendants contend that Dr. Anderson's opinion is based on an erroneous understanding of the composition of the braze paste. (Worthington Mot. to Exclude at 11:18–12:18.) Dr. Anderson asserts that the braze is a copper, nickel compound. (Anderson Decl. at Ex. 5, p. 3; Anderson Depo. at 164:16–23.) Stephen Gentry,[8] Worthington's Regulatory Affairs Manager, and Dr. Thomas Eagerboth attest to the fact that the braze contains phosphorous in addition to copper and nickel.(GentryDecl. at ¶7; Eager Decl. at ¶23.) The Court also notes that the results of Dr. Anderson's EDS test reflected the presence of phosphorous in the braze. (Anderson Decl. at Ex. 5.) Defendants contend that the existence of phosphorous gives the braze paste a higher melting point than that contemplated by Dr. Anderson. (Gentry Decl. at ¶8.) Despite being apprised of the apparent discrepancy multiple times, Dr. Anderson has never addressed the existence of phosphorous in the braze paste or Defendants' arguments about how this affects the melting point of

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[8] Mr. Gentry's previous positions with Worthington include Quality Control Manger and Project Engineer. His responsibilities at Worthington have included the design and development of propane cylinders and valves. (Gentry Decl. at ¶1.)

the paste. Plaintiffs' Opposition fails to address the argument in its entirety.

Defendants also contend that Dr. Anderson did not perform a sufficient amount of testing and what limited testing he did conduct does not support his theory that a failure in the braze joint was the cause of Mr. Shalaby's injuries. (Worthington's Mot. to Exclude [Doc. No. 58] at 17:14–18:9.) Dr. Anderson based his opinions in part on "pull tests" performed by one of his associates, ChrisSchneider, on two cylinders. (Anderson Depo. at 66:15–24.) During the first test, Mr. Schneider applied lateral force to the cylinder with a torque wrench prior to conducting the pull test, which caused the cylinder to fail in the parent metal. (*Id.* at 56:20–57:4; 68:15–69:13.) During the second test, Mr. Schneider performed the pull test without applying lateral force to the cylinder, which caused the cylinder to fail in the brazed joint. (*Id.* at 68:15–69:1; 72:3–5.) Dr. Anderson maintained that this testing allowed him to rule out the possibility of a failure in the parent metal of the torch Mr. Shalaby was using at the time of the accident. (Anderson Depo. 52:11–53:2; 68:15–72:1.)

The Court finds several issues with these tests, as well as the conclusions Dr. Anderson reached as a result of the testing. As an initial matter, the Court finds the second test suspect. In connection with its motion to exclude, Worthington provided a video of the two "pull tests." (Huang Supp. Decl., Ex. P.) In the video depicting the second test where the failure allegedly occurred in the parent metal, there is an initial failure which causes a flame for approximately 30 seconds. At that point, an individual—presumably

Mr. Schneider—walks from the rear of the cylinder to the left side of the cylinder and after a few moments, grabs the wrench and pulls it downward, which results in another failure that causes a large flame ball that goes out almost instantly. Id. Having reviewed Dr. Anderson's deposition testimony, there is no reference to or explanation of this second failure. Worthington's expert Dr. Thomas Eager contends that the initial failure was in the parent metal, andthat the second failure was in the braze joint. (Worthington's Mot. to Exclude at 8:7--23.) He assertsthat the braze joint only failed because it had been substantially weakened by the flame that was caused by the initial failure at the time when the second force was applied. (*Id.*) Plaintiffs' opposition does not address the issue. Based on the foregoing, the Court finds that the testing factor cuts against a finding of reliability.

Although the Court does not find it particularly clear, it appears that Plaintiffs are alleging both a manufacturing and design defect. As to the alleged design defect, Dr. Anderson opines that the MAPP cylinder has a "design defect" because the "valve is in a high-stress area where it meets the cylinder," and contends that it should be "redesign[ed] to make it stronger." (Anderson Depo. at138:12–22.) Dr. Anderson testified at his deposition that this design defect could be rectified by riveting or flaring the valve back or putting a shield or "doughnut" to spread out forces on the cylinder wall. (*Id.* at 139:1–140:3.) Dr. Anderson, however, admitted that he had not designed a cylinder with the proposed changes, nor had he seen such a design before in a MAPP gas cylinder, or in any other flammable gas cylinder. (*Id.* at 138:23–25;

140:6–11.) Dr. Anderson also admitted that he had not tested and was unaware of any testing of the proposed design. (*Id.* at 140:15–20.) Thus, the testing factor cuts against the reliability of Dr. Anderson's proffered testimony regarding this alternative design.

*ii. Peer Review and Publication*

Plaintiffs first point to Dr. Anderson's consideration of the 49 C.F.R. § 178.65 specifications, which provide the specifications for non-reusable (non-refillable) cylinders, as well as a report entitled"The Behaviour of 'Bernzomatic' MAPP and Propane Cartridges When Exposed to Heat and Flame."(Pls.' Opp. at 30:18–26; Anderson Decl., Ex. 3, 4.) As an initial matter, the report about the exposure of MAPP gas cylinders to heat and flame does not pertain to the strength of the braze joint and, as Dr.Anderson conceded, only enabled him to rule out the theory that Mr. Shalaby kicked the torch into the fire pit. (Anderson Decl. at ¶4.)

The specifications provide several requirements relating to the overall strength of the braze joint:

> (iii) Brazed seams must be assembled with proper fit to ensure complete penetration of the brazing material throughout the brazed joint.
>
> (iv) Minimum width of brazed joints must be at least four times the thickness of the shell wall.
>
> (v) Brazed seams must have design strength equal to or greater than 1.5 times the minimum strength of the shell

> wall.
> (vi) Welded seams must be properly aligned and welded by a method that provides, clean uniform joints with adequate penetration.
> (vii) Welded joints must have the strength equal to or greater than the minimum strength of the shell material in the finished cylinder.

49 C.F.R. § 178.65(c)(2). Although the specifications are relevant, they do not "support" Dr. Anderson's theory. Assuming Dr. Anderson's testimony that the black spots that appear in the metallurgy tests are indeed voids,[9] there is still brazing material from the center valve housing down into the interior of the cylinder shell, which appears to comply with the requirement for complete penetration "throughout the brazed joint." The requirements that would seem most relevant to the question of whether the brazed joint was defective would relate to the overall strength of the brazed joint, as well as the strength of the brazed joint as compared to the strength of the shell wall. Dr. Anderson, however, conducted no test to determine the strength of the brazed joint or the strength of the brazed joint compared to the shell wall, and indicated during his deposition that he "[a]bsolutely do[es] not need to do that." (Anderson Depo. 180:1–9; 181:5–21.) Accordingly, it does not appear that the regulations provide support for Dr. Anderson's theory.

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[9] Dr. Eagar contends that the black areas, which are magnified 100 to 200 times, are in fact iron phosphides.(Eagar Decl. at ¶¶20–22.)

Plaintiffs also place great emphasis on the fact that in reaching his conclusions, Dr. Anderson relied on several other cases of litigation that arose out of similar incidents involving MAPP gas cylinders. (Pls.' Opp. at 22:19–24.) In his initial report, Dr. Anderson identified seven cases involving MAPP gas cylinders that he reviewed. (Anderson Decl., Ex. 5.) In his deposition, Dr. Anderson stated that his opinion was supported after reviewing nine other alleged incidents of braze failure. (Anderson Depo. at 76:11–25; 81:11–83:17.) On cross examination, however, Dr. Anderson conceded that he had no information about six of these incidents beyond a review of the complaint, and he admitted that he did not know whether any of these cases involved a failure of a braze joint. (*Id.* at 83:19–86:2;100:7–104:4; 112:21–115:8.)

For the three other incidents, Dr. Anderson stated that he had only reviewed photographs of the accident cylinders and admitted that he could not know for certain whether the cylinders failed in the braze joint without physically inspecting them. (*Id.* at 95:23–96:5; 108:13–19; 111:9–21.) Dr. Anderson did, however, indicate that he contacted experts in two of those cases as a means of bolstering his own opinion that the cylinders failed in the braze joint. (*Id.* at 88:3–10; 109:1–5.) As to the Glenn case, however, Dr. Anderson admitted that he did not ask Dr. Carr, Glenn's expert, whether the failure was in the braze joint. (*Id.* at 88:3–10.) As to the Venderlinde case, Dr. Anderson stated at his deposition that he spoke to Venderlinde's expert, Dr. Thomas Crane, who he says told him that the failure occurred in the braze joint. (*Id.* at 109:1–8.) Defendants dispute whether this is in

fact true. (Worthington Reply at 3:18–20; Ergo Decl. at ¶¶2–3.) Regardless of the veracity of Dr. Anderson's testimony, however, it does not appear to the Court that the Venderlinde case supports Dr.Anderson's theory. Plaintiffs have provided nothing to the Court to show that the facts of the Venderlinde case are similar to those here, or anything to show how Dr. Crane reached the conclusion that the failure was in the braze material. The burden is on the proponent of the expert to establish, by"a preponderance of the evidence[,] . . . that the expert is qualified to render the opinion . . . ." *Heston v. City of Salinas*, 2007 U.S. Dist. LEXIS 96095, at *4–*5 (N.D. Cal. Mar. 30, 2007) (citing *Daubert* I, 509 U.S. at 588–90). Plaintiffs cannot meet this burden by merely stating, without any evidentiary support, that Dr. Crane's opinion in an unrelated case supports Dr. Anderson's theory.

Finally, Plaintiffs provide no evidence to indicate that Dr. Anderson's two reports, which were prepared in connection with this litigation, were peer reviewed. Accordingly, the Court finds that this factor cuts against a finding that Dr. Anderson's theory is reliable.

As to Dr. Anderson's proposed design for the design defect claim, Dr. Anderson conceded at his deposition that he was not aware that the proposed design had been the subject of any peer review or recognition by a professional publication. (Anderson Depo. at 140:21–141:8.) Accordingly, the Court finds that this factor also cuts against the reliability of Dr. Anderson's proposed alternative design.

*iii. Rate of Error*

In cases where a specific scientific technique is used, the court should "consider the known or potential rate of error." *Daubert* I, 509 at 594. Here, Plaintiffs have provided no evidence or testimony regarding any known or potential rate of error for the "pull tests" conducted by Dr. Anderson. Attached to Dr. Anderson's declaration is an excerpt from a 1985 edition of "Metals Handbook Desk Edition," published by American Society for Metals. (Anderson Decl., Ex. 2.) Having examined the portion of the excerpt relating to the microhardness testing procedure that Dr. Anderson utilized in this case, there is no discussion about the rate of error. Moreover, Dr. Anderson only performed two tests in this case, which were not identical in nature. Thus, it is impossible to discern the rate of error in the tests conducted by Dr. Anderson himself. Without any tangible evidence of error rates for the "pull tests" performed by Dr. Anderson, this factor also weighs against a finding of reliability as to Dr. Anderson's theory that the braze material failed in this case.

*iv. General Acceptance*

In Exhibit 2 attached to Dr. Anderson's declaration, Dr. Anderson states that the included reference manual is "generally accepted and used by professional engineers." (Anderson Decl., Ex.2.) Although the Court agrees that a microhardness test is a generally accepted way to test the strength of the brazing material, valve, and cylinder, the Court finds

this factor has little weight in light of the problems with the particular tests performed here as noted supra.

*v. Litigation Generated Opinions*

In addition to the four factors discussed supra, the Ninth Circuit has also found one "very significant" additional factor to be "whether the experts are proposing to testify about matter growing naturally and directly out of research they have conducted independent of the litigation, or whether they have developed their opinions expressly for purposes of testifying." *Daubert* II, 43 F.3d at 1317.Dr. Anderson is a paid consultant who conducted the research underlying his report for the purposes of this litigation only. In *Daubert* II, the Ninth Circuit cautioned that "If the proffered expert testimony is not based on independent research, the party proffering it must come forward with other objective, verifiable evidence that the testimony is based on 'scientifically valid principles.' One means of showing this is by proof that the research and analysis supporting the proffered conclusions have been subjected to normal scientific scrutiny through peer review and publication." *Daubert* II, 43 F.3d at1317--18. Plaintiffs have clearly not met this burden.

*vi. Other considerations*

In addition to the foregoing factors, the Court also finds that one additional consideration weighs

against a finding of reliability. Defendants contend that Dr. Anderson's testimony should be excluded as unreliable because he disregarded the testimony of Park Rangers Ratliff and Stephens, the only two individuals who saw the torch after the accident occurred.

Shortly after the explosion occurred, Ratliff and Stephens both observed the torch. Ratliff, one of the rangers who observed the torch after the accident, testified that prior to becoming a park ranger at Campland he was a certified welder for the Navy and was familiar with the torch used by Mr. Shalaby. (Ratliff Depo. at 56:1–57:57:23; 66:2–10.) Ratliff testified at his deposition that after the incident, he examined the torch and cylinder for approximately one hour. (*Id.* at 66:20–23.) Ratliff testified that he observed that the torch had a "right-angle bend to it," and that there was a crack in the cylinder at the bottom thread level of the cylinder. (*Id.* at 25:16–25; 28:1–15.) Ratliff further testified that the crack was "forced open, outward . . . like an explosion outward," (*Id.* at 67:21–69:24), and that"[i]t appeared to me that the torch . . . might have been banged against something that might have adjusted the thread area of where the torch nozzle and the canister would connect and . . . may have weakened that area in the process of being banged." (*Id.* at 70:10–19.) Stephens, who had also used MAPP gas on several occasions, testified that the cylinder was "burst open. . . just beyond the threads of the neck." (Stephens Depo. at 41:9–18; 42:14–43:1.) He described the split as measuring"approximately two and a half inches long" and "maybe a quarter-inch wide." (*Id.* at

42:14–43:1.)Ratliff also testified that another staff member at the campground threw the torch and cylinder away two or three days after the accident. (Ratliff Depo. at 37:15–17.)

Dr. Anderson testified that he did not consider Stephens' testimony because "that would be the result of an explosion and not a mechanical failure of a poorly designed joint." (Anderson Depo. at 150:12–16.) Dr. Anderson also indicated that he did not accept Stephens' testimony regarding the length of the crack and would not opine about the length of the crack in Mr. Shalaby's cylinder. (*Id.* at 150:23–151:17.) In addition, Dr. Anderson indicated that he did not believe Mr. Ratliff wasdescribing a fractured surface that was curled outward. (*Id.* at 150:17–22.) Dr. Anderson admitted thatboth Ratliff's and Stephens' description of the torch and cylinder "would suggest that there was someexplosion on the inside consistent with perhaps dropping it in the fire leading the pressure to build up.The pressure does not vent properly, and it builds up and it opens up." (*Id.* at 144:15–22.) Dr. Anderson also conceded that his theory was directly contradicted by Ratliff's and Stephens' description of the cylinder. (*Id.* at 146:25–147:7.) When asked why he discounted both descriptions, Dr. Anderson responded:

> I believe their deposition was [sic] taken the following April, about a year later. I think the recollection of . . . Randy Stephens was rough. And I think that I put more weight on Warren Ratliff, mainly because he seemed to have

> worked with the material before. And I got a different opinion reading the Ratliff depo. . . . Besides, there would be a tremendous amount of smoke issues on it. The outer surface would be burned. It just didn't seem reasonable to me.
>
> (*Id.* at 147:8–24.)

The Court finds it curious that Dr. Anderson disregarded the testimony of the only two witnesses who actually saw Mr. Shalaby's torch after the accident occurred. Both rangers consistently testified that the crack appeared to be blown outward, and both indicated that it looked as if the crack was caused by an explosion. The Court also notes that Paramedic Joe Russo, who treated Mr. Shalaby at the accident scene, testified that Mr. Shalaby stated he had kicked the cylinder into the campfire which resulted in an explosion, thus further corroborating the testimony of the rangers. (Russo Depo. at 14:3–25; 22:6–23:7.) Dr. Anderson, however, dismissed this as a possibility because it was"farfetched." (Anderson Depo. at 137:137:1–17.) Dr. Anderson later testified that he did not consider the theory that Mr. Shalaby threw the cylinder into the fire pit because he considered it "very bizarre and not credible." (*Id.* at 187:7–14.) Dr. Anderson, however, conceded that there were documents and testimony to support this "bizarre" theory, and acknowledged that while he chose to believe part of Ranger Ratliff's testimony, he chose to disregard his testimony regarding abuse as "one of the bizarre issues . . . Because I've seen other failures,

pictures that we've just passed out today from other situations, that this is a critical area, that it tends to fail . . . ." (*Id.* at 188:7–25.) In light of Dr. Anderson's complete disregard of the state of the torch and cylinder as described by the only witnesses who viewed them after the accident, and Dr. Anderson's failure to give a reasonable explanation for failing to consider these descriptions, the Court finds this as yet one more reason why his opinions are not reliable. "The gatekeeping inquiry must be tied to the facts of a particular case." *Cooper v. Brown*, 510 F.3d 870, 942 (9th Cir. 2007.) "[N]othing in either *Daubert* or the Federal Rules of Evidence requires a district court to admit opinion evidence that is connected to existing data only by the ipse dixit of the expert." *General Elec. Co. v. Joiner*, 522 U.S. 136, 146 (1997).

When closely scrutinized, Dr. Anderson's opinion that the braze material failed in this case rests on one microhardness test—which Plaintiffs have failed to show was conducted according to generally accepted standards—that resulted in a failure of the braze material; an alleged statement made by an expert to Dr. Anderson in an unrelated case that a failure in the braze joint caused the failure of the cylinder in that case; and results from metallurgy tests that Dr. Anderson contends show the existence of voids or porosity in the braze material. From this, he leaps to the conclusion that the voids or porosity make the braze material in these MAPP gas cylinders unreasonably weak, that this porosity will cause the braze material to fail, and that Mr. Shalaby's cylinder failed in the braze joint.Based on the foregoing, the Court finds no indicia of reliability with respect to Dr.

Anderson's proffered testimony that the braze material was the source of failure in Mr. Shalaby's cylinder. Inaddition, the Court finds that Plaintiffs have completely failed to provide any evidence that Dr. Anderson's testimony regarding his proposed alternative design is reliable. Accordingly, the Court, in its gatekeeping capacity, finds that Dr. Anderson's proffered testimony does not comport with Rule702 or *Daubert* in terms of reliability.

*b. Relevancy*

Although the Court has determined that Dr. Anderson's proffered testimony is not reliable, thus making its relevance here minimal, there are additional reasons to find his proffered testimony irrelevant. The relevancy, or "fit," prong requires that the testimony be "relevant to the task at hand,. . . i.e., that it logically advances a material aspect of the proposing party's case." *Daubert* II, 43 F.3dat 1315 (quoting *Daubert*, 509 U.S. at 597). Relevancy requires opinions that would assist the trier of fact in reaching a conclusion necessary to the case. See Kennedy, 161 F.3d at 1230; *Daubert*, 509U.S. at 591–92. In light of the Supreme Court's ruling in *Daubert*, the Ninth Circuit has since construed the relevancy prong to be broader than the threshold relevancy determination under Rule402.*Daubert* II, 43 F.3d at 1231 n.17 (stating that the Supreme Court "obviously did not intend the second prong of Rule 702 to be merely a reiteration of the general relevancy requirement of Rule402"). In reaching such a conclusion, the Ninth Circuit cited the Supreme Court's recognition "that

scientific expert testimony carries special dangers to the fact-finding process because it 'can be both powerful and quite misleading because of the difficulty in evaluating it.'" Id. (quoting *Daubert*, 509U.S. at 595). With the above principles in mind, the Ninth Circuit advised, "Federal judges must therefore exclude proffered scientific evidence under Rules 702 and 403 unless they are convinced that it speaks clearly and directly to an issue in dispute in the case, and that it will not mislead the jury."Id.

Defendants contend that without having the torch that caused Mr. Shalaby's injuries, Dr. Anderson's opinions and conclusions are irrelevant. (Defs' Mot. for Summ. J. [Doc. No. 45] at6:22–7:7.) Specifically, the Defendants contend that in the absence of the actual torch, Plaintiffs cannot establish the essential element of causation. While the Court disagrees with this assertion, the Court agrees that Plaintiffs have failed to show that Dr. Anderson's opinion is sufficiently linked to the facts of this case. Dr. Anderson acknowledged during his deposition he did not know if the cylinder Mr. Shalaby was using at the time of the accident was the same as the exemplar cylinders that he examined and tested. Indeed, Dr. Anderson could not even state what year Mr. Shalaby's torch wasmanufactured. (Anderson Depo. 185:12–186:6.) This glaring omission makes it doubtful whether Dr. Anderson's "reasoning or methodology can be applied to the facts in issue." *Daubert* I, 509 U.S. at592–93. This, combined with Dr. Anderson's admission that he disregarded the descriptions of the post-accident torch and cylinder by the only available eyewitnesses, shows that even were the Court to find

Dr. Anderson's testimony reliable, it certainly would be of limited relevance to this cause of action. Although the issue is not before the Court, the braze material may indeed be unreasonably weak; however, this fact does not answer the ultimate question of what caused Mr. Shalaby's torchto fail, nor will it assist the jury in answering the question. Accordingly, because the Court finds Dr. Anderson's proffered testimony to be unreliable and irrelevant, the Court hereby GRANTS defendants' *Daubert* motions to exclude his testimony.

*B. Dr. Alison Vredenburgh*

Dr. Alison Vredenburgh, Ph.D., is Plaintiffs' expert on consumer warnings. In her report, Dr. Vredenburgh discusses the warnings on the torch. (Gould Decl., Ex. 9.) She states that the warnings are in an illegible 6 point font, "which is too small for most people to read." (Vredenburgh Depo. at72:24–25.) She also opines that the torch packaging should not have indicated that it was ideal for lighting grills if it in fact was not. (*Id.* at 78:21–79:10.) Dr. Vredenburgh also noted that the warnings should have included information indicating how to protect oneself in the event of an explosion. (*Id.* at 128:22–129:2.)[10]

Defendants seek to exclude Dr. Vredenburgh's

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[10] The Court notes that Plaintiffs' opposition contends that Dr. Vredenburgh opined that the warning on the cylinder should have advised the user to "wear proper clothing." (Pls.' Opp. at36:10–16.) The Court, however, finds no support for Plaintiffs assertion in Dr. Vredenburgh's testimony.

proffered testimony on grounds that she is notqualified because she "does not possess the necessary skill, experience, training, or education requiredto establish her as an expert under the standards of FRE 702 to offer testimony pertaining to the design of a MAPP gas cylinder." (Worthington's Mot. to Exclude [Doc. No. 53] at 3:16–21; Bernzomatic's Mot. for Summ. J. at 17:24–19:21.) They also seek to exclude her proffered testimony on grounds that it is not relevant, and thus cannot meet the standards of Rule 702 and *Daubert*. (Worthington's Mot.to Exclude at 3:22–4:9; Bernzomatic's Mot. for Summ. J. at 19:22–21:17.)

1. *Qualifications*

Bernzomatic disputes Dr. Vredenburgh's qualifications to render an opinion in this case because "she lacks the necessary expertise and qualifications on various aspects of this case: the product, the industry, and the target audience." (Bernzomatic's Mot. for Summ. J. at 19:17–19.)Worthington's motion only disputes Dr. Vredenburgh's qualifications to testify as it relates to gascylinder warnings. (Worthington's Mot. to Exclude at 3 n.1.)

Rule 702 requires that a prospective witness be "qualified as an expert by knowledge, skill, experience, training, or education[.]" Fed. R. Evid. 702; see also *Daubert* II, 43 F.3d at 1315. The Ninth Circuit has defined this as the threshold issue in determining whether a witness may come"before the jury cloaked with the mantle of an expert[]" under Rule 702, and has cautioned that "care must be taken to assure that a proffered witness truly qualifies as an expert, and

that such testimony meets the requirements of [that] Rule[.]" *Jinro America Inc. v. Secure Investments, Inc.*, 266 F.3d 993,1004 (9th Cir. 2001).

> Dr. Vredenburgh's CV indicates that she:
>
> > consults with businesses and industry in areas including product warning design, injury prevention, machine guarding, job design, job and task analysis, program evaluation, training, risk management, Americans with Disabilities Act (ADA), Occupational Safety and Health Administration (OSHA), organizational development and assessment, and research instrument development and validation.

(Gould Decl., Ex. 8, at 2.) She is also a consultant for product liability, personal injury, and employment cases in the areas of "human factors, safety, and industrial-organizational psychology."(*Id.*) Although Dr. Vredenburgh lists a number of different industrial-organizational consulting jobs she has had in the past, only one appears to bear any resemblance to this litigation. According to her CV, in 2006, Dr. Vredenburgh served as a warnings consultant for Broco, Inc., for whom she"developed and tested warnings regarding an underwater cutting torch for the Owner's Manual and Packaging." In her June 13, 2008 report, Dr. Vredenburgh stated that her expertise is "based upon a combination of education, original theoretical research, and professional employment."

(Gould Decl., Ex. 9, at 6.)

Worthington's only attack to Dr. Vredenburgh's qualifications arises in the context of herreference to a defect where the torch connects to the cylinder in her June 2008 report. (Worthington's Mot. to Exclude at 3:4–21; Gould Decl., Ex. 9, at 4.) Plaintiffs have failed to show that Dr. Vredenburgh is qualified to testify regarding the design of the MAPP gas cylinder. Dr. Vredenburgh even conceded that she is not an engineer and that design issues are outside her expertise.(Vredenburgh Depo. at 120:16–124:11.) Accordingly, the Court GRANTS Worthington's motion toexclude Dr. Vredenburgh's proffered testimony regarding the design of the MAPP gas cylinder.

Bernzomatic contends that Dr. Vredenburgh is unqualified to testify to any matters arising in this case because she has no knowledge of the product, she does not know how the product works, she is unfamiliar with the product audience, and she has no knowledge about the industry. (Bernzomatic's Mot. for Summ. J. at 17:25–19:21.) Upon review of the evidence, Bernzomatic's position appears tohave credence. Dr. Vredenburgh testified that she had never operated a hand-held torch and cylinder.(Vredenburgh Depo. at 20:7–16; 29:17–19.) She also testified that the only time she could remembersseeing a hand-held torch being operated was "more than 17 years ago." (*Id.* at 20:17–21:15.) Shetestified incorrectly how the torch is used, stating that she thought a user had to apply an externalignition source to light it. (*Id.* at 32:1–6.) Dr. Vredenburgh also demonstrated that she was unfamiliarwith the audience when she stated that the only time she had ever spoken to a user of a handheld

torchand cylinder about his use of the product was "many, many years ago." (*Id.* at 36:25–29:3.)

In addition, Dr. Vredenburgh's education and experience seem largely inapposite to this litigation. Plaintiffs, who are proffering the testimony, state in their opposition, "her specialty extends beyond traditional psychology in that she specializes in organizational psychology centered on social psychology, personnel, and human resources." (Pls.' Opp. at 35:1–3.) A review of her CV demonstrates a strong emphasis in human factors and ergonomics. (Gould Decl., Ex. 8.) It is unclear how this background makes Dr. Vredenburgh qualified to testify about warning labels on a torch and/or gas cylinder.

The only experience that appears to have any relation to this litigation is Dr. Vredenburgh's consulting job that related to an underwater cutting torch for which she was tasked with formulating and revising warnings. (Vredenburgh Depo. at 29:5–16; 44:17–46:14; 49:1–4.) Dr. Vredenburgh testified that the underwater torch did not have any attached gas cylinder, but rather received gas via a tube that is hooked to a compressor on a boat at the surface. (*Id.* at 15–25.) Due to a non-disclosure agreement, Dr. Vredenburgh was unable to discuss further any of the work she performed on the product in detail. (*Id.*) Bernzomatic contends that this is not enough to find Dr. Vredenburgh qualified because the underwater torch "obviously is directed at a different audience as a hand-held torch, does not present the same explosion hazards under water, and would not be purchased to light a campfire or a grill under water." (Bernzomatic's Mot. for Summ. J. at 19:2–7.) The Court agrees.

Anyconnection between the two types of torches is tenuous at best, and Dr. Vredenburgh's experience withinstruction manuals for an underwater torch is certainly insufficient to qualify her as an expert on warning labels for handheld torches attached to a gas cylinder.

*2. Daubert Standards*

Even were the Court to find that Dr. Vredenburgh is qualified to testify, her proffered testimony would ultimately be excluded as unreliable and irrelevant under the *Daubert* standards. Dr. Vredenburgh admitted during her deposition that she did not collect any empirical data, did not conduct any testing, did not conduct any surveys, did not seek data from the manufacturers, did not review any peer-reviewed literature, and she did not conduct any other kind of research prior to forming her opinion. (Vredenburgh Depo. at 9:9–10:11; 12:18–25; 34:11–13; 39:4–12; 40:6–11;42:13–15.) Moreover, Dr. Vredenburgh described a detailed process of how she would normally evaluate warnings for her clients, but then admitted that because she was not hired to develop any warnings in this case, she did not follow this process in reaching her conclusion that the warning was inadequate. (*Id.* at 49:6–50:19.)

Moreover, it is doubtful whether her opinion would even be relevant. Her opinions regarding the torch and cylinder warnings do not speak clearly to the issue of causation because she could not say that the lack of warning resulted in Mr. Shalaby's injuries. Dr. Vredenburgh stated during herdeposition that she

could not say that the accident would not have occurred if the label on the torchwas larger than a 6 point font. (*Id.* at 73:7–11.) She also stated that she could not say whether removing the statement that the torch was ideal for lighting grills would have prevented Mr. Shalaby's injuries. (*Id.* at 78:21–79:10.) Indeed, her theory hinged on the assumption that Mr. Shalaby purchased the torch for the sole purpose of lighting a grill or campfire. (*Id.* at 77:11–78:5.) However, Mr. Shalaby testified that he also purchased the torch for "storage in the motor home because [he] could do mechanical repairs if there's a breakdown." (Shalaby Depo., 346:14–347:3.) Moreover, when Dr. Vredenburgh stated that the warnings should have included information about how to protect oneself in an explosion, she failed to suggest anything specific that could have been added that would have prevented Mr. Shalaby's injuries. (Vredenburgh Depo. at 128:22–129:2.) Indeed, when asked whatwarning could have been added to the cylinder or torch that could have prevented the accident, sheresponded, "I don't know why it failed, so I don't know that a warning would have helped." (*Id.* at125:5–22.)

Without being able to establish this essential element of a failure to warn cause of action, Dr. Vredenburgh's testimony is of limited relevance to this litigation. "Faced with a proffer of expertscientific testimony, . . . the trial judge must determine at the outset . . . whether the expert is proposing to testify to (1) scientific knowledge that (2) will assist the trier of fact to understand or determine a fact in issue." *Daubert* I, 509 U.S. at 592. The fact in issue for Plaintiffs' failure to warn cause of action is causation,

i.e., whether the failure to warn Mr. Shalaby resulted in his injuries. Even if Dr. Vredenburgh's opinions were scientifically valid, her testimony is excludable because it doesnot shed light on the causation issue. Accordingly, the Court hereby GRANTS Bernzomatic's andWorthington's motions to exclude Dr. Vredenburgh's proffered testimony.

II. Bernzomatic's Summary Judgment Motion

A. Legal Standard

A moving party is entitled to summary judgment only if he can demonstrate that (1) "there is no genuine issue as to any material fact," and (2) the moving party is "entitled to judgment as a matter of law." Fed R. Civ. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). A material issue of fact is one that raises a question that a trier of fact must answer to determine the rights of the parties under the substantive law that applies. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A dispute is genuine if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Id. at 248. The initial burden is on the moving party to show that both prongs are satisfied. Celotex, 477 U.S. at 323. The moving party can satisfy this burden in two ways: (1) by presenting evidence that negates an essential element of the nonmoving party's case; or (2) by demonstrating that the nonmoving party failed to make a showing sufficient to establish an element essential to that party's case on which that party will bear the burden of proof at trial. Id. at 322–23.

If the moving party fails to discharge this initial burden, summary judgment must be denied, and the court need not consider the nonmoving party's evidence. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144,159–60 (1970). If the moving party meets this initial burden, the nonmoving party cannot defeat summary judgment merely by demonstrating "that there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986); Anderson, 477 U.S. at 252 ("The mere existence of a scintilla of evidence in support of the nonmoving party's position is not sufficient."). Rather, the nonmoving party must "go beyond the pleadings and by her own affidavits, or by 'the depositions, answers to interrogatories, and admissions on file,' designate'specific facts showing that there is a genuine issue for trial.'" Celotex, 477 U.S. at 324 (quoting Fed.R. Civ. P. 56(e)). The inferences to be drawn from the facts must be viewed in a light most favorable to the nonmoving party. *Gibson v. County of Washoe, Nev.*, 290 F.3d 1175, 1180 (9th Cir. 2002). "Credibility determinations, the weighing of evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge, [when] he is ruling on a motion for summary judgment." Anderson, 477 U.S. at 255.

B. Bernzomatic's Motion for Summary Judgment

Bernzomatic argues that without Plaintiffs' experts, Plaintiffs have "failed in their duty to present a prima facie claim against Bernzomatic, and summary judgment is therefore appropriate."

(Bernzomatic's Mot. for Summ. J. at 21:22–23.) In their opposition, Plaintiffs contend that summaryjudgment is inappropriate because strict liability applies, the defects can be established without expert testimony under the "consumer expectations test," and the doctrine of res ipsa loquitur applies. (Pls.'Opp. at 39:17–45:11.)

Federal district courts sitting in diversity apply state law to product liability claims. *Stilwell v. Smith & Nephew*, Inc., 482 F.3d 1187, 1193–94 (9th Cir. 2007). In California, a manufacturer, distributor, or retailer is liable in tort if a defect in the manufacture or design of its product causes injury while the product is being used in a reasonably foreseeable way. *Soule v. General Motors Corp.*, 8 Cal. 4th 548, 560 (Cal. 1994). Under California law, "A product liability case must be based on substantial evidence establishing both the defect and causation (a substantial probability that the design defect, and not something else, caused the plaintiff's injury) and where . . . the complexity of the causation issue is beyond common experience, expert testimony is required to establish causation." *Stephen v. Ford Motor Co.*, 134 Cal. App. 4th 1363, 1365 (Cal. Ct. App. 2005) (citing *Dimond v. Caterpillar Tractor Co.* 65 Cal. App. 3d 173, 177 (Cal. Ct. App. 1976.) Mere possibility alone is insufficient to establish a prima facie case. *Jones v. Ortho Pharm. Corp.*, 163 Cal. App. 3d 396, 403(1985).

Plaintiffs first contend that this case is a strict liability case. (Pls.' Opp. at 39:17–41:18.) In order for strict liability to attach to a manufacturer of a product, however, causation must be established. *Sparks v. Owens-Illinois, Inc.*, 32 Cal. App. 4th 461, 472 (Cal. Ct.

App. 1995). Because the Court has excluded the proffered testimony of both Dr. Anderson and Dr. Vredenburgh, Defendants contend that there is no triable issue of fact on the element of causation. Plaintiffs, however, contend that "Defendants have not met their burden of providing any evidence of unforeseeable misuse." Plaintiffs' argument is unpersuasive. Defendants have successfully demonstrated that Plaintiffs failed to make a showing sufficient to establish the element of causation. Because Plaintiffs will ultimately bear the burden of proof on this element at trial, the burden shifts to Plaintiffs to present competent summary judgment evidence on the element of causation. Much of Plaintiffs' argument is directed to Plaintiffs' excluded theory that the fracture groove was defective and the cause of Mr. Shalaby's injuries. Plaintiffs do not even address the alleged defect in the brazedjoint, and fail to connect their theory that the braze material failed in the cylinder to the facts of theircase. Thus, Plaintiffs have failed to meet their burden. Considering that Plaintiffs have not presented competent summary judgment evidence on the element of causation, the Court need not consider whether Defendants have carried their burden of demonstrating that a triable issue of fact exists on their affirmative defense of unforeseeable misuse. Accordingly, the Court finds this argument to be without merit. Next, Plaintiffs contend that causation can be established without expert testimony under the"consumer expectations test." (Pls.' Opp. at 41:19–43:18.) In California, "the consumer expectations test is reserved for cases in which the everyday experience of the product's users

permits a conclusion that the product's design violated minimum safety assumptions, and is thus defective regardless of expert opinion about the merits of the design." Soule, 8 Cal. 4th at 567. In applying the test, the California Supreme Court has advised, "The crucial question in each individual case is whether the circumstances of the product's failure permit an inference that the product's design performed below the legitimate, commonly accepted minimum safety assumptions of its ordinary consumers." Id. at568–69.

Under the facts of this case, the consumer expectations test is not applicable. It is undisputed that the cylinder can explode for reasons other than a defect, e.g. abuse. An ordinary consumer of a torch and MAPP gas cylinder cannot reasonably expect that a cylinder will be designed to be indestructible and incapable of exploding. Moreover, Plaintiffs' theory of defect is one of technical and mechanical detail.[11] Plaintiffs' theory seeks to establish that porosity in the braze material exists, the level of porosity makes the braze joint in the cylinder unreasonably weak, and that this is what caused Mr. Shalaby's injuries. "Indeed, both parties assumed that quite complicated designconsiderations were at issue, and that expert testimony was necessary to illuminate these matters."

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[11] The Court notes that much of Plaintiffs argument revolves around their theory that the fracture groove was defective. Based on the prior orders of this Court, and the fact that the Court has denied Plaintiffs' request for leave to amend, the Court did not consider any arguments relating to this theory. Thus, the only theory that shall be addresses is Plaintiffs' theory that the braze joint in theMAPP gas cylinder failed.

Id. at 570. A jury would be unable to assess the porosity in a cylinder without the benefit of an expert, nor would it be able to understand how the strength of the braze joint is affected by porosity. Like in Soule, this is simply not a case where the test should be applied.

Finally, Plaintiffs contend that the doctrine of res ipsa loquitur precludes the entry of judgment in Bernzomatic's favor. (Pls.' Opp. at 43:19–44:10.) Plaintiffs' reliance on this doctrine, however, ismisplaced. In California, the doctrine of res ipsa loquitur is defined by statute as "a presumptionaffecting the burden of producing evidence." Cal. Evid. Code § 646(b). The presumption arises only when the following circumstances exist: "(1) the accident must be of a kind which ordinarily does not occur in the absence of someone's negligence; (2) it must be caused by an agency or instrumentality within the exclusive control of the defendant; [and] (3) it must not have been due to any voluntary action or contribution on the part of plaintiff." *Brown v. Poway Unified School Dist.*, 4 Cal. 4th 820,825–26 (Cal. 1993). Here, the torch was not in the "exclusive control of the defendant," and Plaintiff shave not established that Mr. Shalaby did not contribute to the accident. Plaintiffs assert that the burden shifts to Defendants to prove that Mr. Shalaby's injuries were caused by misuse. (Pls.' Opp.at 44:7–10.) This contention, however, for the reasons noted above, is erroneous. Accordingly, thisargument is also without merit.

Without the testimony of their experts, Plaintiffs have not presented any admissible evidence to create a triable issue of material fact regarding

whether the torch was defective. Accordingly, the Court hereby GRANTS Bernzomatic's motion for summary judgment on all claims.

III.Additional Pending Motions

The Court notes that there are three additional motions that have been filed in this action butare not yet fully briefed. These motions are Worthington's motion for summary judgment against Plaintiffs (Doc. No. 49) and cross motions for summary judgment on the Third Party Complaint brought by Worthington and Bernzomatic (Doc. Nos. 44, 55). Although there does not appear to be Ninth Circuit case law that addresses the unique procedural posture of this case, several of our sister circuits have found quite clearly that a court is deprived of subject matter jurisdiction over the third party complaint when summary judgment is entered in favor of the original defendant/third party plaintiff because such a ruling eliminates the "case or controversy" of the third party complaint. See *Faser v. Sears, Roebuck & Co.*, 674 F.2d 856, 860 (11th Cir. 1982); *Trw Title Ins. Co. v. Sec. UnionTitle Ins. Co.*, 153 F.3d 822, 827 n.3 (7th Cir. 1998); *Arcon Corp. v. Liberty Mutual Ins. Co.*, 591 F.Supp. 15, 18–19 (M.D. Tenn. 1983). Here, Worthington's liability is secondary to, or derivative of, Bernzomatic's liability on the Plaintiffs' claims. Thus, in light of the fact that summary judgment hasbeen granted in favor of Bernzomatic on all claims, the Court no longer has jurisdiction over the thirdparty complaint because there is no longer a "case or controversy" at issue. Accordingly, theremaining

motions for summary judgment are MOOT, and third party complaint is DISMISSED.

## CONCLUSION

For the reasons stated herein, the Court GRANTS Third Party Defendant Worthington's motions to exclude testimony by Dr. Alison Vredenburgh (Doc. No. 53) and Dr. Robert Anderson(Doc. No. 58),and Defendants Irwin Industrial Tool Company, Inc. and The Home Depot, Inc.'s motion for summary judgment (Doc. No. 45). In addition, the Court FINDS AS MOOT the remaining motions for summary judgment (Doc. Nos. 44, 49, 55), and the third party complaint is DISMISSED for lack of subject matter jurisdiction.

This order disposes of all claims. Accordingly, the Court ORDERS the Clerk of Court to enter judgment in favor of Defendants Irwin Industrial Tool Company and The Home Depot, and to terminate the case.

IT IS SO ORDERED.

DATED: July 28, 2009

s/Hon. Michael M. Anello
United States District Judge

July 28, 2010, Filed No. 09-56331

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

ANDREW W. SHALABY; et al.,

Plaintiffs - Appellants,

v.

NEWELL RUBBERMAID, INC.; et al.,

Defendants-cross-claimants - Appellees,

and

WESTERN INDUSTRIES, INC.; et al.,

Cross-defendants - Appellees,

D.C. No. 3:07-cv-02107-MMA-BLM
Southern District of California, San Diego

ORDER

Before: D.W. NELSON and REINHARDT, Circuit Judges, and FRIEDMAN, Senior Circuit Judge.*

* The Honorable Daniel M. Friedman, United States Circuit Judge for the Federal Circuit, sitting by designation.

The panel has voted unanimously to deny the petitions for rehearing and rehearing en banc. The full court has been advised of the petitions for rehearing en banc, and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35. The petitions for rehearing and rehearing en banc are denied. All pending motions are denied as moot.